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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES C. DAVIS,

Defendant and Appellant.

2d Crim. No. B268034  
(Super. Ct. No. MA054631-01)  
(Los Angeles County)

Charles C. Davis appeals an order denying a petition to recall and resentence his felony conviction for the unlawful driving or taking of a vehicle with a prior similar conviction to a misdemeanor pursuant to Proposition 47. (Pen. Code, §§ 666.5, 1170.18, subd. (a).)<sup>1</sup> We affirm.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

### *FACTUAL AND PROCEDURAL HISTORY*

On December 15, 2011, the Los Angeles County prosecutor filed an information charging Davis with the unlawful driving or taking of a vehicle with a prior similar conviction (count 1), the unlawful driving or taking of a vehicle (count 2), and receiving stolen property (count 3). (§ 666.5; Veh. Code, § 10851, subd. (a); § 496, subd. (a).) The prosecutor also alleged that Davis served three prior prison terms within the meaning of section 667.5, subdivision (b).

The charges arose from the November 16, 2011, theft of a 1992 Honda Accord automobile owned by Marco Cruz. The following day, Los Angeles Police Detective Mark Donnel saw Davis sitting inside the stolen automobile which was parked near the residence at 44384 Stanridge Avenue in Lancaster. When Davis saw Donnel, he “laid down on the seat, across the seat, on the passenger side.” As Donnel drove by, he checked the license plate and confirmed that the automobile was stolen. After seeing Donnel, Davis left the automobile and ran to the front door of the residence. Donnel followed Davis and arrested him. The ignition to the automobile had been drilled out and metal shavings lay on the floorboard.

That same day, Sheriff's Deputy Jeremiah McNutt served a search warrant on Robert Beltran, another resident of 44384 Stanridge Avenue, regarding an unrelated criminal

matter. Beltran informed McNutt that he saw Davis drive the stolen automobile and park it in the driveway. Beltran also stated that a different person had stolen the automobile.

On January 18, 2012, Davis waived his constitutional rights and pleaded nolo contendere to the unlawful driving or taking of a vehicle with a prior similar conviction (count 1). (§ 666.5.)<sup>2</sup> He also admitted that he served two prior prison terms pursuant to section 667.5, subdivision (b). In accordance with a plea agreement, the trial court sentenced Davis to six years in county jail, consisting of the upper term of four years for count 1, plus two years for the prior prison term enhancements. The court then suspended execution of sentence and granted Davis three years of formal probation with terms and conditions, including service of 130 days confinement in county jail and payment of fines and fees, including a \$1,200 restitution fine and a \$1,200 probation revocation restitution fine (suspended). (§§ 1202.4, subd. (b), 1202.44.) The court awarded Davis 130

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<sup>2</sup> Section 666.5, subdivision (a) provides: “Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code, or felony grand theft involving an automobile in violation of subdivision (d) of Section 487 . . . , or a felony violation of Section 496d regardless of whether or not the person actually served a prior prison term for those offenses, is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or a fine of ten thousand dollars (\$10,000), or both the fine and the imprisonment.”

days of presentence custody credit and, upon the motion of the prosecutor, dismissed counts 2 and 3. (§ 1385. subd. (a).)

On September 4, 2015, Davis filed a petition in the trial court requesting resentencing of his section 666.5 conviction to a misdemeanor pursuant to Proposition 47. (§ 1170.18, subds. (a)-(e).) Davis declared that his conviction satisfied the resentencing requirements of section 1170.18, including the less-than-\$950 value of property taken. On November 4, 2015, the court denied the petition, ruling that “the charge does not qualify for Proposition 47 reduction.”

Davis appeals and contends that the trial court erred by denying his petition because he is eligible for resentencing pursuant to section 490.2, defining petty theft as a misdemeanor.<sup>3</sup>

### *DISCUSSION*

Davis argues that section 490.2 includes the crime of vehicle theft or posttheft driving prohibited by Vehicle Code

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<sup>3</sup> Our Supreme Court is presently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft or whether the defendant may be resentenced as if convicted of misdemeanor petty theft. (*People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 9, 2016, S232250; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; and *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150.)

section 10851, subdivision (a).<sup>4</sup> He acknowledges that section 490.2 does not expressly refer to section 10851, but asserts that we must broadly interpret the statute to effect the voters' intent. Davis points out that judicial decisions and secondary authorities commonly refer to a section 10851 conviction as “vehicle theft.” He also contends that excluding a section 10851 offense from Proposition 47 denies him equal protection of the law.

Proposition 47 amended and enacted various provisions of the Penal and Health and Safety Codes to reduce certain drug and theft offenses to misdemeanors, unless committed by ineligible defendants. Proposition 47 also enacted section 1170.18, which creates a procedure whereby a defendant who has suffered a felony conviction of a now reclassified crime can petition to have it redesignated a misdemeanor.

Section 1170.18 subdivision (a) provides: “A person currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under the act . . . had this act been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.”

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<sup>4</sup> All references to section 10851 are to Vehicle Code section 10851.

Section 490.2, subdivision (a) provides:

“Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.”

For several reasons, the trial court did not err by denying the resentencing petition.

Neither section 666.5 nor section 10851 is listed in sections 1170.18 or 490.2. Moreover, neither section was amended by Proposition 47. At the time of Davis's conviction, and now following Proposition 47, a violation of section 666.5 is punished by imprisonment for two, three, or four years.

In his plea agreement, Davis admitted that pursuant to section 666.5, he was previously convicted of an auto theft conviction. Section 666.5 then required felony punishment for Davis as a recidivist. Thus, he would not “have been guilty of a misdemeanor under [Proposition 47] . . . had [Proposition 47] been in effect at the time of the offense.” (§ 1170.18, subd. (a).)

Moreover, section 10851 punishes vehicle theft as well as posttheft driving (joyriding). (*People v. Smith* (2013) 57 Cal.4th 232, 242 [a person can violate section 10851 by either driving or taking a vehicle]; *People v. Garza* (2005) 35 Cal.4th 866, 876 [unlawful driving of a vehicle is not a form of theft when driving occurs after theft is complete].) Here the information charged driving or taking and Davis pleaded nolo contendere to driving or taking. The evidence contained in the preliminary examination suggests that Davis drove, but did not take, the Honda Accord belonging to Cruz. Section 10851 applies to theft offenses and nontheft offenses, such as driving a vehicle without the owner's consent and without an intent to permanently deprive the owner of the vehicle.

We also disagree that Davis has been denied equal protection of the law. Applying a rational basis scrutiny, our Supreme Court has held that “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles.” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) It is long settled that “a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more

than 5 years under the provisions of section 10851 of the Vehicle Code.” (*People v. Romo* (1975) 14 Cal.3d 189, 197.)

This reasoning also applies to Proposition 47's provisions for resentencing and reclassification of a limited subset of those previously convicted of grand theft of property valued \$950 or less, but not for those convicted of unlawfully taking or driving a vehicle in violation of section 10851. Absent a showing that a particular defendant “has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation.” (*People v. Wilkinson, supra*, 33 Cal.4th 821, 839.) Davis has not made the necessary showing, nor has he shown that he came within the ambit of section 1170.18.

In view of our discussion, we need not discuss Davis's contention regarding the burden of proving the value of the vehicle taken or driven. (§ 490.2.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Charles A. Chung, Judge  
Superior Court County of Los Angeles

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